No. 10368

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

LONG LAKE LUMBER COMPANY, and
F. D. ROBINSON, RESPONDENTS.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR RESPONDENT, LONG LAKE LUMBER COMPANY

FILED

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BRIEF FOR RESPONDENT, LONG LAKE LUMBER COMPANY

JURISDICTION

Respondent, Long Lake Lumber Company, does not question the jurisdiction of this Court. The allegation in the petition for enforcement that "This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act" (R. 88), is admitted by this Respondent in its answer to the petition by failure to deny said allegation. (R. 96).

STATEMENT OF THE CASE

QUESTION INVOLVED: IS LONG LAKE LUMBER COMPANY AN "EMPLOYER"?

The facts relating to this question are as follows:

Respondent, Long Lake Lumber Company, (hereinafter called Long Lake), purchased the standing timber being logged by Respondent, F. D. Robinson in the Caribou Basin Logging Operation involved in this proceeding, from the Humbird Lumber Company under a written contract dated June 28th, 1935. (Respondents' Ex. No. 2.) (R. 469-480). This contract required Long Lake to cut the timber "in accordance with the rules and regulations of the U. S. Forestry Service in force on contracts governing the sale of U. S. Forestry timber at the present time." (R. 474) It contained a provision for termination in case of default by Long Lake in the performance of any of its terms and conditions in the manner therein specified. (R. 479)

Respondent, Robinson, was conducting the logging operations in 1939 under a contract in writing between Long Lake and himself dated January 26, 1939. (R. 501, 554) This contract, Respondents Ex. No. 4, (R. 502-504), provided that all work must be done to conform with the contract with Humbird Lumber Company for the purchase of the timber. (R. 504) Long Lake agreed to pay Robinson certain specified prices per M for logging. (R.503). Robin-

son did the logging, handling the logs from the stump to the car. (R.513-514, 554). He employed the men, and fixed their wages, salaries or compensation. (R. 122, 516) Long Lake did not direct Robinson as to whom he should employ, or as to when or how long he should employ them, or whether or not they should be discharged. (R.122, 516) Long Lake, or its officers, did not know the individuals whom Robinson employed. (R. 516) Robinson maintained a cook-house for providing meals for the employees, and conducted it, employing and paying the cook and bull-cook. (R. 516) He also maintained a blacksmith shop, and employed the blacksmith and paid his wages. (R. 517) Robinson owned all equipment used in the logging operations. (R.632) Long Lake had no logging equipment on the operation, (R. 169) and did not own any logging equipment any place. (R. 518) Robinson paid the Unemployment Compensation, Industrial Accident Insurance and Social Security Taxes for his men, (R. 175, 554) and had a hospital contract for the men in case of illness or injury. (R. 554)

Respondent, Robinson, was customarily engaged in the business of a logging contractor, (R. 528) and had been so engaged for more than 20 years. (R. 528) He used some of his equipment for other things than logging, and on other jobs. (R. 550-551) In 1939, he constructed a dam at Colburn for Long Lake under a separate contract. Respondents Ex. No. 5.

(R. 507-509)

Not only Long Lake, but Humbird Lumber Company as well, actively supervised the logging of the timber, to see that it was cut according to the contract. (R. 521-524) Employees of Humbird Lumber Company made the scale at the landings on which payment for the stumpage as well as payment for the logging was made. The three parties in interest accepted that scale as the basis for settlement on their respective contracts. (R. 521) Humbird Lumber Company had other employees working in the woods in connection with the logging operation, who checked to see that the timber was cut and handled according to the contract, and that the job was done in a workmanlike manner, including the disposal of the slash which Long Lake was required to take care of under the contract. (R. 522-523)

Most of this work in 1939 was done for Long Lake by James Brown, Jr., whose instructions from James M. Brown, Sr., president of Long Lake, were "to watch the job continuously and most rigidly to see that Mr. Robinson would conform with the Humbird contract". He did not instruct James Brown, Jr., or any other employee of Long Lake to direct Robinson in the conduct of his logging operations, but at all times "advised them that it was Mr. Robinson's job and not ours". (R. 524) No employee of Long Lake had authority to direct Robinson in the conduct of his logging operations. (R. 524) James M. Brown,

Sr., did not at any time direct Robinson in the conduct of his logging operations. (R. 525) James Brown, Jr., was at Caribou Basin in 1939, as assistant woods superintendent of Long Lake (R. 123) to see that Robinson's operations were conforming to the Humbird contract. (R. 151) He did not direct the men in their work. (R. 132) His father (James M. Brown, Sr.) had told him not to interfere with the work, and he had followed those instructions. (R. 131) He measured the stumps and checked up on percentages (R. 165), but did not direct any of the workmen or direct Robinson as to the rate and progress of cutting, except according to the Humbird contract. (R. 166) Robinson and Davis (Robinson's bookkeeper, (R. 676) signed the checks to the employees of the Caribou camp in 1939. (R. 172)

Robinson did not contact, or talk to, James M. Brown, Sr., or anyone, on that subject, after first learning that the Caribou Camp was being organized. (R. 223)

The Board's witness, Leon M. Wise, testified that Robinson said he would "shut the camp down" on the morning of June 5th, (R. 234-236), the day before the record of the telephone calls to Robinson, at Sandpoint, Idaho, from J. M. Brown's telephone number in Spokane, Washington, on the evening of June 6th. (R. 666-671)

SUMMARY OF ARGUMENT

I. The finding of the Board that Long Lake was

and is an employer of the employees at Caribou Basin engaged in logging operations within the meaning of Section 2 (2) of the Act (R. 41) is not supported by substantial evidence.

II. The finding of the Board that Long Lake participated in the unfair labor practices found to have been committed by Robinson, and thus discriminated in regard to the hire and tenure of employment of the employees, etc. (R. 42-43) is not supported by substantial evidence.

III. The Board's order requiring Respondent, Long Lake, to cease and desist from the matters and things therein specified, and to take the affirmative action therein set forth (R. 49-53) is invalid and improper under the Act, and is unnecessary to insure the effectiveness of the order with respect to Respondent, Robinson.

ARGUMENT

POINT I.

LONG LAKE IS NOT AN EMPLOYER OF THE EMPLOYEES AT CARIBOU BASIN WITHIN THE MEANING OF SECTION 2 (2) OF THE ACT.

The legal relationship between Long Lake and Robinson is evidenced by the contract of January 26, 1939, Respondents Ex. No. 4, (R. 502-504), in which Long Lake agreed to pay him certain specified prices per M for logging, and in which it was pro-

vided that all work must be done to conform with the contract with Humbird Lumber Company for the purchase of the timber. (R. 503-504) The Humbird contract, Respondents Ex. No. 2, (R. 469-480) required Long Lake to cut the timber in accordance with the rules and regulations of the Forestry Service (R. 474), and to pay for it on a stumpage basis. (R. 478)

Since the provisions of the Humbird contract covered all requirements governing the logging of the timber, it was not necessary to repeat them in the logging contract. Long Lake was obligated to conform to the provisions in the Humbird contract, and in contracting with Robinson to log the timber it was essential for its protection that he be required to comply with those provisions. In consequence, Long Lake had to exercise such supervision over the logging of the timber as would insure Robinson's performance of its obligations to the Humbird Lumber Company.

Long Lake did not retain any right of control or direction over the details of the logging operation by the terms of the contract, or otherwise. Robinson agreed to produce certain results, viz., to log the timber according to the requirements of the Humbird contract, and to deliver the logs. When these results were accomplished, he had fully performed his obligations to Long Lake under his contract.

In the performance of his contract with Long

Lake, Robinson had full and complete control of his logging operations. He had the right to determine the mode and manner in which he would perform the work under the contract. Long Lake had no right to tell Robinson how many men he should employ, the wages they should receive, or the time they should be permitted to work. The evidence is undisputed that he did hire and fire his own employees, fix their salaries and wages, and discharge them when he saw fit. (R. 122, 516) He maintained his logging camp at his own expense, directed his employees what to do, furnished all equipment for the logging operations, (R. 632) kept his own books, paid all taxes and contributions for workmen's compensation, social security, hospital contracts (R. 175, 554), and in every way did what any man usually does when he is running his own business.

The record contains no evidence that Long Lake, through any of its officers or representatives, or otherwise, claimed or asserted the right to direct Robinson, or interfere with his freedom of action, in handling all the details of his logging operations. On the contrary, the record shows that he was in full charge and had complete control of the operations from the time the trees were felled until the logs were delivered to Long Lake. (R. 513-514, 554)

Robinson had been engaged in the business of a logging contractor for a long period of time, (R. 528) and had contracted with lumber companies other

than Long Lake. (R. 550-551) In addition, he contracted with others for the performance of work in which he used his equipment when the logging operations were closed down. (R. 550-551) He was customarily engaged in the independently established business of a logging contractor. (R. 528)

During the course of his logging operations for Long Lake, Robinson entered into a separate and distinct contract for the construction of the dam at Colburn Creek. (R. 507-509) The arrangement for this work was covered by a contract in writing bearing date of August 18, 1939, the year involved in this proceeding. Respondents Ex. No. 5. (R. 508-509) Under the terms of this contract he was to furnish all the labor and all the material for the construction of the dam, skidways, etc., in accordance with the plan which had been outlined, and was to be reimbursed for all money expended, and paid ten per cent for his services. He was also to receive a reasonable rental charge for his equipment used on the job.

The freedom from control which determines the existence of the relationship of independent contractor is not an absolute and complete freedom from control. It is freedom from control as to the details of the work. As stated by the Washington Court in the case of Washington Recorder Publishing Co., v. Ernst, 91 Pac. (2d) (Wash.) 718, 124 A.L.R. 667. "The Courts have never held that, in the determination of the relationship of independent contractor,

there must be an absolute and complete freedom from control."

Applying this test to the relationship between Long Lake and Robinson, as disclosed by the record, there can be no question that Robinson was an independent contractor, and was the sole employer of the men employed in his logging operations. He had full and complete control of the details of the work and the mode and manner of performing it. Long Lake was interested only in the results of the work, viz., having the timber logged in accordance with its obligations under the Humbird contract, and in the delivery of the logs. Any supervision exercised by Long Lake was confined to the protection of its own interests, and did not extend to the control of the details of the work. Long Lake had the right to give advice and render assistance to Robinson. It was to its interest that his operations should be successfully conducted.

The record discloses that the legal relationship of Respondent, Robinson, to Long Lake was that of an independent contractor under the common law test governing the relationship, the test adopted by the Supreme Court of Idaho, the place of performance, and the test adopted by the Supreme Court of Washington, the place where the contract was apparently made.

THE COMMON LAW TEST. The principal elements to be considered in determining whether the

relationship is that of employee or independent contractor under the common law are set forth in the Restatement of the Law of Agency, Volume 1, Section 220, at pages 483-485, and the statement therein contained is supported by the decisions of the courts of last resort in practically all the jurisdictions in this country, as shown by the following citations:

19 A.L.R., pages 226 to 276;
James v. Tobin-Sutton Co., 195 N. W. (Wis.) 848;
Indiana Iron Co. v. Cray, 48 N. E. (Ind.) 803;
Prest-O-Lite Co. v. Skeel, 106 N. E. (Ind.) 365;
Alexander v. R. A. Sherman's Sons Co., 85 Atl. (Conn.) 515;
Nichols v. Hubbell, 103 Atl. (Conn.) 835, 19 A. L. R. 221;
Linquist v. Hodges, 94 N. E. (Ill.) 94;
Ballard & B. Co., v. Lee, 115 S.W. (Ky.) 732;
Messmer v. Bell, etc. Co., 117 S.W. (Ky.) 346;
Carrico v. West Virginia, etc. Co., 19 S. E. (W. Va.) 571;
Gall v. Detroit Journal Co. 158 N. W. (Mich.) 36, 19 A.L.R. 1164;
Laffery v. United States Gypsum Co., 111 Pac. (Kans.) 498;
Peters v. St. Louis & S.F.R. Co., 131 S. W. (Mo.) 917;
Crossett Lumber Co. v. McCain. ——S. W. (2d) (Ark.) ——;
Williams v. United States, 126 Fed. (2d), 129, (C. C. A. 7)

THE IDAHO TEST. The following is the definition of an independent contractor adopted by the Supreme Court of Idaho:

> "An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work and not as to the means whereby it is to be accomplished . . . . . The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for."
>
> Joslin v. Idaho Times Publishing Co., 56 Ida. 242-253, 53 Pac. (2d) 323.

In the opinion in the last cited case, the Supreme Court of Idaho stated:

> "The right to control must not be merely as to the accomplishment of the work, but it must be as to the mode and means of performance."
>
> Joslin v. Idaho Times Publishing Co., *supra,* page 253.

THE WASHINGTON TEST.

In one of the latest decisions of the Supreme Court of Washington in which the relation of independent contractor was involved, the Court held that the provisions of the Unemployment Compensation Statute, which manifestly were intended to limit the application of the common law rule, did not change the relationship, and adhered to the common law test of independent contractors as stated in former decisions of that Court. In the opinion the Court stated that the extension of the term "employment" to include independent contractors and others not within the employer-employee relationship, which

was urged, invites a challenge to the constitutionality of the Act, as the tax enacted of the employer would be a tax upon the naked right to contract.

Washington Recorder Publishing Co., v. Ernst, 91 Pac. (2d) (Wash.) 718, 124 A.L.R. 667.

After considering the common law test, as set forth in the Restatement of the Law of Agency, the Court quoted with approval from many of its former decisions in the following cases:

Leech v. Sultan R. & Timber Co., 297 Pac. (Wash.) 203, 205.

Amann v. Tacoma, 16 Pac. (2d) (Wash.) 601, 607.

Carlson v. Collier & Son Corporation, 67 Pac. (2d) (Wash.) 842-849.

Sills v. Sorenson, 73 Pac. (2d) (Wash.) 798, 801.

Larson v. American Bridge Co. 82 Pac. (Wash.) 294.

The provision for cancellation on thirty days' notice by either party is not determinative of the question.

In Gall v. Detroit Journal Co., *supra.* the contract contained the provision that, "This agreement may be terminated by either party at any time without notice."

In Washington Recorder Publishing Co. v. Ernst, *supra,* the cancellation provision read: "It is understood and agreed that this agreement may be cancelled at any time, at the discretion of The Daily Olympian."

In Crossett Lumber Co. v. McCain, *supra,* the written contract between the parties permitted canclla-tion by either on three days' notice.

The intent to nullify such a long established legal principle can not be attributed to the Congress by reason of the inclusion in the definition of an "employer" in Sec. 2 (2) of the Act, the clause reading: "any person acting in the interest of an employer, directly or indirectly", in the absence of convincing evidence that such was the purpose of this clause. There is no such evidence, either in the Congressional Debates, or the Reports of the Committees. It is not entirely clear what Congress meant by this provision, but a reasonable interpretation is that its purpose was to reach persons acting for and on behalf of an employer, such as a superintendent, foreman or agent. If such persons committed unfair labor practices in violation of the Act in the interest of the employer they could be treated as employers for the purposes of enforcement. It is an unreasonable interpretation to include within the definition every person who is in a position to exert some influence on the employer through financial control, or otherwise. Such an interpretation could make the employer's banker or lawyer an "employer" for the purposes of the Act.

None of the cases cited in the Board's Brief support such an interpretation. The decisions are grounded on the "amount of control" exercised over

the employees. Thus, in the case on which the Board places great reliance, Butler Brothers v. N.L.R.B. (C.C.A. 7), 12 L.R.R. 287, the Court held the owner of the building an "employer" within the Act because of the amount of control retained by the owner under the contract by which the independent contractor "ostensibly became the employer of the maintenance employees involved in this controversy." The Board had found that "in actual practice under the contract" the owner continued to direct much of the work of the maintenance employees, to exercise a controlling voice in decisions as to their hire and tenure of employment, and to formulate labor relations policy." The Court held that this finding had factual support, and that t here was a reasonable inference that the owner's motive, in part at least, in executing the contract was to escape cerain demands made upon it by the Union. In the opinion, the Court distinguished the case of Williams v. United States, *supra,* in which the same Court had held that the performer of the services was an independent contractor, on the ground that the "amount of conrol retained by petitioner, as disclosed by the contract, and especially by its subsequent conduct toward the employees" made the cases distinguishable in at least one important aspect. The decision in the Williams case was not modified or weakened by the opinion in the Butler Brothers case.

POINT II.

LONG LAKE DID NOT PARTICIPATE IN THE UNFAIR LABOR PRACTICES FOUND TO HAVE BEEN COMMITTED BY ROBINSON.

The finding "that Long Lake participated in and directed the decision to shut down the camp" (R.40) finds no support in the record. It is based on suspicion and conjecture, and not on evidence.

The proof offered was a record of telephone calls to Robinson, at Sandpoint, Idaho, from J. M. Brown's telephone number in Spokane, Washington, on the evening of June 6th. (R. 666-671) There was no evidence as to the identity of the person making the calls, or the subject of the conversations. The calls were made a day and a half after Robinson had threatened to "shut the camp down" according to the testimony of the Board's star witness, Leon M. Wise. (R. 234-236) This statement was made in the morning of June 5th, before James Brown, Jr. arrived at the camp in the evening. (R. 234) This shows that Robinson acted on his own initiative, and reached his decision before he could have received any advice from Long Lake, or its officers, at the times relied upon as the grounds of suspicion. No witness testified that any officer or representative of Long Lake directed Robinson to close the camp, and both Brown, Sr. and Robinson denied it. (R.225, 226-227)

Long Lake was never asked to bargain with the

Union, and the finding that it refused to bargain is not supported by any evidence. There is nothing in the record to indicate that Long Lake, or any of its officers, had anything to do with the negotiations between Robinson and the Union representatives. Robinson a nd his attorney conducted all negotiations.

POINT III.

THE BOARD'S ORDER AGAINST LONG LAKE IS INVALID AND IMPROPER, AND IS UNNECESSARY.

Since Long Lake is not an employer of the men involved the Board had no jurisdiction to include it in the order. The Board can proceed only against an "employer" under the Act. Long Lake is not in a position to comply with the order. It can not reinstate any of Robinson's employees. The employer-employee relationship does not exist between Long Lake and Robinson's employees. He hired them, and none of Long Lake's officers even know the individuals employed on the job. (R. 516) Long Lake does not have the power to negotiate a contract for Robinson. The order directs Long Lake to take action which it does not have the power to take.

Furthermore, the record does not indicate that it is necessary that the order include Long Lake to insure its effectiveness as to Robinson.

CONCLUSION.

It is respectfully submitted that the order of the Board should be set aside, and enforcement thereof denied, as to Respondent, Long Lake Lumber Company.

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